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**Decision of the arbitral tribunal established to settle the dispute concerning  
the course of the boundary between Austria and Hungary  
near the lake called the "Meerauge"**

13 September 1902

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**PART XXVIII**

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**Décision du tribunal arbitral établi afin  
de résoudre le différend relatif au tracé de la  
frontière entre l’Autriche et la Hongrie,  
près du lac appelé «Meerauge»**

**Décision du 13 septembre 1902**



DECISION OF THE ARBITRAL TRIBUNAL ESTABLISHED TO SETTLE  
THE DISPUTE CONCERNING THE COURSE OF THE BOUNDARY  
BETWEEN AUSTRIA AND HUNGARY NEAR THE LAKE CALLED  
THE “MEERAUGE”, DECISION OF 13 SEPTEMBER 1902\*

DÉCISION DU TRIBUNAL ARBITRAL ÉTABLI AFIN DE RÉSOUDRE  
LE DIFFÉREND RELATIF AU TRACÉ DE LA FRONTIÈRE ENTRE  
L’AUTRICHE ET LA HONGRIE, PRÈS DU LAC APPELÉ  
«MEERAUGE», DÉCISION DU 13 SEPTEMBRE 1902\*\*

Arbitration – procedure – competence of arbitrators limited to disputed territory by arbitral agreement – In absence of restrictive provision on how frontier should be determined, it is left to arbitral tribunal’s discretion and conscientious judgment – inadmissibility of a reservation made by a Party as inconsistent with the content and the purpose of the arbitral agreement, since it involved reserving the right to claim a further modification of the border, which would undermine the position of the arbitral tribunal and the validity and finality of its decision.

Border delimitation – absence of evidence indicating a mutually agreed boundary – mere exercise of territorial sovereignty by conducting territorial survey in order to determine taxation cannot be recognized as an act legally determining a national frontier; since act was unilateral and land office lacked the power to define the frontier – power to define borders belongs only to the monarch – the statement made by an Austrian treasury officer belonging to a previous mixed boundary commission which did not finish its task, does not bind the State as approval of a higher authority would certainly have been needed. However, it proved that Austria did not acknowledge the Hungarian claim of a wet boundary, fact which might have formed the basis of a favourable decision of arbitral tribunal with respect to Hungary’s claim.

Border delimitation – evidence – burden of proof belongs to Party not currently in possession of land – if no evidence submitted to counter expert’s opinion, it must form the basis of the tribunal’s decision – maps produced prior to adoption of treaty which established validity of acquisition of territory under international law cannot be considered dispositive – as the disputed territory constitutes a topographical whole, it is hard to imagine without any proof in support, that just a small part of it has been treated differently from the whole.

Border delimitation – absence of possession from time immemorial (form of possession where no evidence can be adduced that situation was ever different and no living person has ever heard of a different state of affairs, and that the possession has been unbroken, uncontested and continued up to the present) – the exercise of sovereign rights during a century and a half has no prescriptive benefit and is not relevant for the award as sovereignty remained disputed and hostilities occurred between the parties.

Natural boundary – the arbitral tribunal considers itself bound to proceed with consideration of the natural boundary – any natural obstacle qualifies as natural boundary – at any point

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\* Reprinted from Georges Frédéric De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International, continuation du Grand Recueil par H. Triepel*, Troisième série, tome III, Leipzig, 1910, Librairie Dieterich, p. 71. (German version, translation by the Secretariat of the United Nations).

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boundary may shift from river to ridge line or from stream bed to rise – the location of the source of Bialka river is at the heart of the dispute. Regarding a river which is formed by confluence of two brooks, it is the most important one which has to be considered as the source of the river - a brook does not divide a forest which presents a uniform character on both sides – as a natural boundary, the mountain ridge should be preferred to a river – if a brook has a changeable stream bed, it is not suitable to serve as a boundary because of the possible disputes regarding bridging points.

Arbitrage – procédure – compétence des arbitres limitée par le compromis d'arbitrage au territoire qui fait l'objet du litige – à défaut de toute disposition limitative, la manière dont la frontière doit être délimitée est laissée à la libre appréciation du tribunal arbitral – inadmissibilité de la réserve d'une Partie invoquant le droit de réclamer ultérieurement une modification de la frontière, du fait de son incompatibilité avec le contenu et le but du compromis d'arbitrage et de l'affaiblissement qui en résulterait sur la position du tribunal et sur la force de la chose jugée propre à sa sentence.

Délimitation frontalière – absence de preuve indiquant l'établissement d'une frontière par consentement mutuel – l'exercice de prérogatives souveraines sur un territoire telle que l'exécution de travaux d'arpentage à des fins fiscales, ne peut être considéré comme un acte de nature à délimiter juridiquement les frontières de l'État, étant donné qu'il s'agit d'un acte unilatéral, et que le Cadastre n'a pas la compétence de délimiter la frontière – la délimitation frontalière est une compétence exclusive du Souverain – la déclaration d'un officier du trésor autrichien appartenant à une précédente Commission mixte de délimitation frontalière n'ayant pas terminé son travail, ne lie pas son État puisque l'approbation subséquente d'une autorité supérieure aurait certainement été requise. Néanmoins, cela permet de prouver que l'Autriche n'a pas accepté la prétention hongroise d'avoir une frontière fluviale, ce qui a contrario aurait pu offrir une base à une sentence arbitrale favorable aux prétentions hongroises.

Délimitation frontalière – preuve – la charge de la preuve pèse sur la Partie non actuellement en possession du territoire revendiqué – en l'absence de preuves contraires à l'opinion de l'expert, celle-ci doit être la base de la décision du tribunal – des cartes établies avant l'adoption du traité qui a validé le titre juridique de l'acquisition territoriale du point de vue du droit des gens, ne peuvent être considérées comme décisives – le territoire contesté formant un ensemble topographique, il est difficile d'imaginer sans preuve à l'appui, qu'une petite partie de ce territoire ait été traitée de manière différente du tout.

Délimitation frontalière – absence de possession immémoriale (forme de possession où la preuve ne peut être faite qu'elle ait jamais été autre et où la possession fut ininterrompue, incontestée et continue jusqu'à la période présente) – l'exercice de droits souverains pendant près d'un siècle et demi ne donne pas le titre juridique de la prescription acquisitive, et en l'espèce, cela n'est pas un fait pertinent puisque la souveraineté est restée contestée et des hostilités ont régulièrement éclaté entre les Parties.

Frontière naturelle – le tribunal arbitral s'estime lié de procéder en considérant les frontières naturelles – tout obstacle naturel est éligible pour servir de frontière naturelle – à n'importe quel endroit la frontière peut se déplacer de la rivière à la crête des montagnes, de la faille à l'arête – l'emplacement de la source Bialka est au cœur du différend. Pour ce qui est d'une rivière formée par la confluence de deux torrents, c'est le plus important des deux qui doit être considéré comme le cours d'eau générateur – un ruisseau ne divise pas une forêt qui présente un caractère uniforme des deux côtés – en tant que frontière naturelle, la crête d'une montagne doit être préférée à une rivière – si un ruisseau à un cours changeant, il n'est pas approprié pour servir de frontière en raison notamment des possibles différends relatifs à la construction de ponts.

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**Arbitral tribunal constituted to determine the course of the  
boundary between Austria and Hungary and between Galicia  
and Hungary near the lake called the "Meerauge"**

By Imperial Austrian Act of 25 January 1897 (Reichsgesetzblatt RGBI No. 32) and Royal Hungarian Law II of 1897, the Imperial Austrian Government and the Royal Hungarian Government were authorized to entrust an arbitral tribunal, to be constituted, with determining the course of the boundary between Galicia and Hungary close to the lake called the "Meerauge" in the Tatra mountains. In implementation of the Act, the Imperial Austrian Government appointed as arbitrator Dr. Alexander Ritter v. Mniszek-Tchorznicki, Imperial and Royal Privy Councillor and Treasurer and President of the Imperial Superior Court at Lemberg. The Royal Hungarian Government appointed as arbitrator Koloman Lehoczky de Kisráko und Bistricska, Imperial and Royal Privy Councillor and President of the Royal Court at Pozsony (Pressburg). The arbitrators selected Dr. Johannes Winkler, President of the Swiss Federal Court, as President of the tribunal. Dr. Victor Korn, Imperial Hofrat and Inspector of Revenues at Lemburg, and Dr. Ludwig Lában, Judge at the Royal Court of Pressburg, were appointed by the two Governments to assist the arbitrators in their deliberations. The interests of the Austrian half of the Empire and the Province of Galicia were represented before the arbitral tribunal by Dr. Oswald Balzer, Professor at the University of Lemberg. Hungary's interests were represented by Julius v. Bölcs, Royal Hungarian Chief of Section in the Ministry of the Interior. After the arbitral tribunal had been constituted, on 5 and 6 April 1902 in Vienna, and had agreed upon the rules governing its procedures, a public hearing was held, in accordance with those rules of procedure, beginning in Graz on 21 August 1902 and adjourning temporarily on 31 August. During the hearing, the contentions and claims of both parties to the dispute, along with the documentary evidence produced, were submitted by the two arbitrators.

From 1 to 8 September the arbitral tribunal travelled from Graz to the region of the High Tatra mountains and conducted an on-site inspection. In the disputed territory, particular mention should be made of two mountain lakes. The upper lake (elevation 1,584 m) is known in Galicia as Czarny staw ("Black Lake") and in Hungary as Tengersizem ("Meerauge" or "tarn"), while the lower lake (elevation 1,393 m) is known in Galicia as Morskie oko ("Meerauge" or "tarn") and in Hungary as Halastó ("Fischsee" or "Tish Lake").

Fridolin Becker, Colonel on the Swiss General Staff and Professor at Zurich Polytechnic, was invited to participate in the on-site inspection as expert. On 10 September, at the resumed public hearing in Graz, the report of the expert and the concluding arguments of the representatives of both parties were heard.

At its sessions of 11, 12 and 13 September, the tribunal deliberated in the case, on the basis of the documents produced by both sides and the other evidence submitted.

On 13 September the tribunal issued the following:

### **Decision**

I. The frontier shall run from the peak called “Meeraugenspitze”\* (marked A on the sketch prepared by the expert, attached as exhibit 1)\*\* in a northerly direction, across the Froschsee peak (marked B on the sketch), the Zabie ridge and Siedem granatów, to the point where the ridge no longer forms a ridge line, drops off and begins to level out (marked C on the sketch). From there the boundary shall run to the point where Fischsee brook is joined by a small stream flowing from Czuba mountain to the west (marked D on the sketch), some 700 metres above the point where Fischsee brook flows into Poduplaski brook. From point D on the sketch to the confluence of Fischsee and Poduplaski brooks (marked E on the sketch), the boundary shall follow the channel of Fischsee brook.

II. The reservation put on record by the representative of the Imperial Austrian Government on behalf of his principals, to the effect that further territorial claims might later be brought against Hungary regarding the area up to the so-called Polish crest, is rejected as inadmissible because it is inconsistent with the content and purpose of the laws passed by both parties underlying the arbitration agreement.

### **Grounds**

Ad I. In fulfilling the task assigned to the arbitral tribunal under the laws passed by both parties mutually creating the arbitration agreement, one must first determine how the competence of the arbitrators was defined.

The laws in question provide for a restriction only with respect to territory. Thus, the findings of the arbitral tribunal may relate only to the territory in dispute.

In that respect, the claims of the two parties are defining. The Austrian side is claiming a dry boundary line running from Meeraugenspitze, along the Zabie ridge, to the confluence of Fischsee and Poduplaski brooks, as indicated by the letters f, e and d on the sketch appended in document A. Although not correct in all topographical details, the sketch does make it clear which boundaries the two sides are discussing and is attached to this decision only for that reason. The Hungarian party is claiming a wet boundary line running from the tip of Meeraugenspitze along Fischsee brook, as indicated in the said sketch by the letters f, a, b, c and d.

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\* Secretariat note: The name of the peak is currently Rysy.

\*\* Secretariat note: See map No. 3.

Otherwise, the laws in question contain no provisions regarding how the arbitral tribunal should proceed to determine the course of the frontier: whether it should consider previously determined boundaries, or whether it is empowered to determine the boundary on the basis of its own conscientious judgement.

In the absence of any restrictive provision in this regard, the arbitral tribunal took the position that it was left to its discretion to determine the course of the disputed boundary by a thorough evaluation of all the circumstances.

Nonetheless, the arbitral tribunal did commence by examining the documents submitted with a view to ascertaining whether the disputed region contained any boundary previously determined by mutual agreement of the disputing parties.

In the proceedings, both parties to the dispute submitted arguments in that regard. Hungary's submission rested mainly on the contract concluded between Albert a Lasko and Georg Horváth Palocsa on 8 October 1589 and the royal decree of approval of 1 March 1594, as well as the statements made to the boundary adjustment commission in 1793 and 1794 by Galician treasury official, Gregor Ritter v. Nikorowicz. Austria cited a number of legal acts, notably the Josephine Survey, as well as the use, sale and transfer of the rights to the tax district of Zakopane and its attached territories to Emanuel Homolacz in 1824.

However, after careful consideration of the relevant documents, the arbitral tribunal became convinced that none indicated the existence of any mutually agreed boundary.

The Lasko-Palocsa agreement of 8 October 1589, which was confirmed by decree of donation of Emperor Rudolf II, King of Hungary, of 1 May 1594, and the document of 16 March 1595, referring to the same purchase, which concerns the transfer of ownership of the purchased property to the purchaser Georg Horváth von Palocsa, by act of the Cathedral Chapter of Zips as *locus credibilis*, does indeed cover the areas of Ribijstaw and Okolo Ribnieho Stawu, which are certainly part of the territory presently in dispute.

The Austrian side also conceded that Hungary had owned and exercised sovereignty over the territory presently in dispute from 1589 to 1624.

On the other hand, it must not be overlooked that the related documents also refer to towns and lands, such as Bukowinka, Pod czerwenim, and Kiczora, which now indisputably belong to Galicia, and indeed lie rather deep in Galician territory, to the west of the disputed region.

Furthermore, the statements made and documents submitted by both sides show that during the first decade of the seventeenth century armed incursions were made into the region by both sides, leading to an exchange of complaints



between Emperor Ferdinand II and King August III of Poland, and to the appointment of boundary commissions, whose conclusions are not known.

Hungary argued in particular that the Palocsay family had been superseded in possession of the territory west of the Bialka river by the Polish Starost Nikolaus von Komorowski. In the proceedings, the Austrian party submitted a document stating that Komorowski had been awarded possession of the towns of Brzegi, Bukowina and Bialka by Polish authorities in the name of the King of Poland.

The results of the on-site inspection and the very decisive opinions of the expert indicated that it is not Fischsee brook (the boundary line claimed in the present case by Hungary), but Poduplaski brook, which flows to the east of the mountain ridge line, that should be regarded as the source of the Bialka, and that, consequently, the presently disputed territory constitutes a topographical whole with the towns of Brzegi, Bukowina and Bialka.

It is therefore hard to imagine that Komorowski had been awarded ownership of the villages only up to Fischsee brook, and that the small, now disputed part of the whole which lies on the right bank of Fischsee brook had remained in the possession of Hungary.

General procedural principles would indicate that the burden of proof lies with Hungary, not with Austria. Such proof was not given, and the simple fact remains that the Hungarian side at one time owned the territory now in dispute, as part of a larger whole, which reverted and has belonged to Galicia for a long time, on an undisputed basis.

In the absence of proof that the part has been treated differently from the whole since then, the earlier possession obviously does not lead to a conclusion in favour of Hungary's claim.

The so-called Seeger-Török maps produced by both sides are of no great relevance in the present case since they date from the period before the acquisition of Galicia by Austria and before the Warsaw Treaty of 18 September 1773, which established the validity of the acquisition in international law.

At that time, prior to the Warsaw Treaty, Poland was an independent State and the unilateral boundary delimitation done by Seeger and Török was not binding on Poland. A more detailed analysis of the various interpretations and a critique of the Seeger-Török maps are therefore moot.

The later Austro-Hungarian military maps were clearly based on Seeger's first surveys. Indeed, they accord to Hungary an area even more extensive than the area claimed by Hungary at the time of the mixed boundary commissions of 1837, 1858 and 1883, or, for that matter, than the area claimed by Hungary in the present proceedings.

On the older maps, the Bialka river is designated as the border. However, the question of the location of the source of the Bialka river is in fact at the heart of the dispute. It therefore seems to be a matter of paramount importance to determine the source of the Bialka.

In the expert's opinion, the Bialka river is formed by the confluence of Fischsee and Poduplaski brooks, and the Poduplaski is the more important of the two in terms of both the volume of water carried and the size of catchment area. Only the Poduplaski has something of the look of a river, like the Bialka in its lower reaches, from the confluence of the two streams downwards, whereas the water flowing out of the Fischsee valley (Fischsee brook) clearly looks like a brook.

Clarified by the lakes, the water of Fischsee brook foams over dark boulders in its lowest stretch and gives the impression of spring water. Poduplaski brook, on the other hand, carries glacial debris; this debris is white and, in contrast to Fischsee brook, gives Poduplaski brook a cloudy, whitish colour. Above the point where it is joined by Fischsee brook, the Poduplaski may not look like a true river, but it is clearly recognizable as the source of the Bialka; moreover, the stream-bed of Poduplaski brook is clearly distinguishable in type from that of Fischsee brook as that of a much wilder body of water.

The expert's opinion is also supported by the older maps submitted during the proceedings, in which the Bialka river is not designated as such until the confluence of Fischsee and Poduplaski brooks. It is also supported by the fact that in several maps Poduplaski brook is called Biala woda ("white water"), and the names "Bialka" and "Biala woda" are synonymous in Polish. In the view of the arbitral tribunal — based on its own view of the terrain and the impressions gained from the on-site inspection — the expert's opinion is highly convincing. According to the expert, the source of the Bialka river is to be sought at the confluence of the two aforementioned brooks and, if one wished to attribute the same name to a stretch of water further upstream, only Poduplaski brook might be called the Bialka, whereas the Fischsee certainly could not, since a river's name continues with its main course, not with a tributary stream. Moreover, since no evidence was submitted to counter the expert's opinion, it must form the basis for the tribunal's decision.

Thus, all the arguments advanced in support of the Hungarian claim, to the effect that, based on the evidence of certain maps, Fischsee brook forms the upper course of the Bialka river, and that the source of Fischsee brook is the source of the Bialka river, may be discounted.

Arguments were put forward by the Austrian side based on the so-called Josephine Survey carried out in 1785 and 1789, which shows a part of the presently disputed territory — namely the forest — as Galician territory for tax purposes. The Hungarian party contested the identification of the forest presently in dispute as a part of the forest indicated in the Josephine Survey as "las panski Rybie", under topographical No. 4328, measuring 532 Joch and

886 Quadratklafter. However, the expert decisively confirmed the identification through convincing arguments that are included in his opinion attached to the record of the proceedings.

Nonetheless, although the Josephine Survey must be regarded as an act of exercise of territorial sovereignty, it cannot be recognized as an act legally determining the national frontier, since it was a unilateral survey carried out by the Austrian land office without the participation of the Hungarian authorities and the Austrian land office lacked the power to define the national frontier. That power would have belonged to the monarch, who had incorporated Galicia into Austria and granted Hungary's claim to the Zips towns.

The Josephine Survey is therefore not decisive evidence in the present dispute. Like the literary works cited by the Austrian side which more or less clearly confirm that the two lakes belong to Galicia, it can only be regarded as circumstantial evidence indicating that, during the years immediately preceding the transfer of Galicia, the Kingdom of Poland had been in possession of the disputed region and that Austria, following its acquisition of Galicia, had then taken over the exercise of ownership as Poland's legal successor.

Of particular importance in the present boundary dispute are the records of the mixed boundary commissions 1793 and 1794 that carried out their functions in. In accordance with the order of the Governor of Galicia, Z. 3109, of 28 April 1828, issued pursuant to the order of Imperial Minister of State Saurau, Z. 6375, of 27 March 1828, His Majesty the Emperor and King, in consequence of the decision of the Hungarian Parliament to the effect that a formal boundary adjustment should be undertaken between the Kingdom of Hungary and the neighbouring provinces, decreed (court Decree Z. 176, of 28 December 1792) that the Galician side should establish a commission for that purpose. According to the report of the Office of the Governor of Galicia, Z. 1949, of 10 March 1828, Provincial Councillor v. Erggelet was appointed to conduct the boundary adjustment proceedings as General Commissioner and two political officials — an engineer and a treasury official — were assigned to assist him. Under this commission, the existing border differences were presented by the parties as formal written submissions. Hungarian private parties and the Hungarian Government brought claims before the Galician Chancellor of the Exchequer Oliwa, against the Galician Government for the award of various territories. The process only progressed to replies or in some cases counter-replies, and was not concluded, because the proceedings were broken off, with the possibility of resumption at a later date, by an imperial decision of 1794. The records of the proceedings were thus neither concluded nor signed. In this process the Hungarian side claimed a much larger territory, encompassing some 130,000 inhabitants and 47 square miles, including the city of Neumarkt, three market towns and 234 villages, running the so-called Török border to the Beskid mountains. Treasury official Gregor Ritter v. Nikorowicz, in his rebuttal of that claim, made certain statements which the

Hungarian side pointed to as a binding acknowledgement of the wet boundary line claimed in the present dispute. His statements were included verbatim in the presentations of the two arbitrators, but only the following two statements need be recorded here, as being of particular importance. In the proceedings of the Hungarian Government against the Government of Galicia, Nikorowicz stated, in his rebuttal of 13 September 1793, "*hodie linea granicialis inter Scepusium et Galiciam penes montem Rybi Staw cum fluvio Bialka descendit in fluvium Dunajec*" [today the boundary line running between Zips and Galicia to the Rybi Staw mountain descends along the Bialka river to the Dunajec river], and further, "*a praefato monte Rybi Staw progreditur limes inter Scepusiensem comitatum et Sandecensem circum erga septentrionem usque ad caput rivuli Bialka, quem Hungari Bela nominant*" [from Rybi Staw mountain, the boundary shall proceed north, between the district of Zips and Nowy Sącz, to the source of the Bialka river, called by the Hungarians "Bela"]. Nikorowicz accompanied these statements with a marked map, with the letter M, intended to illustrate his description. At a second proceeding held on 4 April 1794, Nikorowicz stated, in his rebuttal of the claims of the district of Zips to the territory between the White Dunajec and the Black Dunajec, that any mountain, or mountain chain, whose summits formed a boundary might easily be designated, and that that was the case between Hungary and Galicia in the Neumarkt region, where the boundary extended over the mountains of Grzebienie, Mala, Wierch, Pięć Stawy, and so forth. He further reiterated that the boundary ran from Gruby Wierch mountain to Rybi Staw mountain and on to the source (caput) of the Bialka river.

These statements would indicate a dry boundary line running across the mountain ridges to the source of the Bialka river. If, as Hungary asserts, one should take Rybi Staw mountain, which features prominently in these statements, to be Meeraugenspitze and thus the source of the Bialka river above the upper lake, then the statements would not accord with the terrain, because the mountain rivulet that flows above the upper lake, which, according to the Hungarian argument, forms the beginning of the Bialka river, lies in a saddle to the west, not to the north, of Meeraugenspitze. This rivulet, which flows down across a large rock face, could in no way be described by anyone as a brook. A comparison of these statements with the situation on the ground shows that Nikorowicz was describing the dry boundary line of the Zabie ridge, which runs north from Meeraugenspitze, and that he must have been referring to the confluence of Poduplaski and Fischsee brooks as the source of the Bialka river.

Moreover, it is significant in this context that not one of Nikorowicz's statements refers to the two lakes in the disputed region, despite the fact that the lakes would, without doubt, be the most significant objects in the wet frontier claimed by the Hungarian side, and that, on the other hand, the Polish crest is mentioned, although it lies much farther east in the middle of the what is now undisputedly Hungarian territory. All this clearly points to a dry

boundary line, across mountain ridges, to the confluence of Poduplaski and Fischsee brooks.

However, this is contradicted by map M, which shows the boundary line running along Fischsee brook. According to the expert, this map is not an independent map drawn up on the basis of an on-site survey, but merely a rough sketch, put together from a number of different maps, which omits any depiction of the mountains. This map was clearly drawn up, not by Nikorowicz himself, but by someone else, and thus did not emanate directly from him; it shows a stream situated above the upper lake as the source of Fischsee brook. However, according to the results of the on-site inspection and the expert's opinion, no such stream exists.

In view of this inconsistency between the map and Nikorowicz's statements, which suggest a boundary line running along the dry mountain ridges, it is simply not possible to derive from his statements a binding acknowledgement of the Hungarian wet boundary line, which might then form the basis of a favourable decision of the arbitral tribunal with respect to Hungary's claims.

On the contrary, the text of Nikorowicz's statements, has more validity than the information provided by map M (which is not reliable, for the aforementioned reasons), and provides a strong argument in favour of the Austrian version — that is, in favour of the dry boundary line.

It should also be noted that, in accordance with the instructions issued on 23 March 1754 by Empress Maria Theresa to the boundary adjustment commission of 1755, the final decision was held in reserve, so that, in the event that both sides reached agreement, approval would have been sought, but if there were competing claims, the imperial decision would have been asserted. According to the aforementioned reports of the Governor of Galicia and the above-mentioned order of the Minister of State to Provincial Councillor v. Erggelet, those instructions were made available to the commissions of 1793 and 1794.

It is fairly obvious, moreover, that neither the Galician Government nor treasury official Nikorowicz, whose task it was to rebut Hungary's much broader claim to the Beskid boundary line, were authorized to speak on the boundary question in a manner that bound the State, and that approval of a higher authority would certainly have been required.

It should be reiterated that these commission proceedings were not concluded; that it is conceivable that those statements might have been expanded upon and explained if the commission proceedings had continued; and that if Nikorowicz really had meant to propose the wet boundary line of Fischsee brook, he would have run counter to the boundary description set forth in the Josephine Survey, which defined a dry boundary line along the mountain ridges. In that light, *restitutio in integrum ob malam defensionem* [restitution in full, on the grounds of invalid defence] by the Austrian side

could not be ruled out. Thus, one cannot conclude that the frontier was set by agreement in the commission proceedings of 1793 and 1794.

The subsequent events referred to by the two parties to the dispute in support of their claims, including the visits to both lakes by the Archduke and the Governor, the sale and transfer of the disputed territory to Emanuel Homolacz in 1824, subleases, fines levied against Galician farmers for grazing livestock on the disputed territory, as well as the various literary works and maps produced during that period or in various decades of the nineteenth century, do no more than provide circumstantial evidence supporting one version or the other to a lesser or greater degree and are thus inconclusive and must be disregarded. The settlement reached by Clementine Homolacz with the minor Palocsay heirs does appear, at first sight, to support the Hungarian claim, since Clementine Homolacz waived her own personal claim to the disputed territory in favour of her Hungarian opponents. However, the petition of the opposing parties that the boundary thus agreed on should be recognized as the national frontier was rejected by the Austrian Government. This purely private settlement cannot, therefore, constitute legal grounds for deciding the question of the national frontier.

As these observations make clear, the supporting evidence presented does not permit the conclusion that, in the present case, a national frontier was ever previously defined in the disputed region, whether by mutual agreement between the parties, expressly under a State treaty or tacitly, or by some other sovereign decision binding on both parties.

However, nor could a decision be reached in the present case on the basis of possession from time immemorial, which if need be might determine the boundary. Possession from time immemorial is understood as the form of possession where no evidence can be adduced that the situation was ever different and no living person has ever heard of a different state of affairs. Such possession must also be unbroken and uncontested (Heffter-Geffcken, *Das europäische Völkerrecht*, 8th ed., 1888, pp. 39 and 155; Rivier, *Droit des gens*, 1896, vol. I, p. 182), and it is self-evident that possession so defined must have continued up to the present — that is, up to the time at which the dispute leading to the conclusion of an arbitration agreement occurred. It cannot be said that these requirements are fulfilled in the present case. It should be noted that sovereignty rights were exercised in the disputed region by both Governments for at least a century and a half, but were never recognized by the opposing party, and the situation frequently led to the outbreak of outright hostilities. Although the Austrian side placed particular emphasis on the fact that, at least from the occupation by Komorowski (1624) until the appearance of Seeger and Török (1769), Poland had enjoyed uninterrupted possession, and that this was a sufficient length of time to accord the Austrian side the benefit of prescription, the above remarks suggest that this argument is completely irrelevant to the present day, when the arbitral tribunal must decide.

The arbitral tribunal therefore considers itself bound to proceed with consideration of the natural boundary, as it is clearly entitled to do under the provisions of the arbitral agreement.

In the opinion of the expert, the valley of Poduplaski brook represents the main valley, because of its topographical situation and formation, whereas the valley of Fischsee brook represents the tributary, or side valley, and the valley of Poduplaski brook forms the natural upstream continuation of the Bialka valley.

Again according to the expert opinion, Fischsee brook originates in the lower lake, which is fed from all sides by streams of various sizes. The most important of the water courses that feed the lower lake is that which flows out of the upper lake and may thus be considered the upper or original course of Fischsee brook. The upper lake is fed by a number of smaller rivulets, some of which are visible flowing over the rocks, and some of which flow into the lake unseen beneath snow and mountain debris. The most significant influx of water comes from the channel that is deepest and most often filled with avalanche snow and begins at the deepest point of the so-called Ochsenrücke ["Ox's Back"], 600 metres west of Meeraugenspitze, and flows into the upper lake. However, none of these channels leads to Meeraugenspitze. There is no natural line, such as a rivulet, from the upper lake to Meeraugenspitze, and if one wished to take a line running through the depths of the valley as the boundary, only the aforementioned channel running down from the Ochsenrücke would qualify. From Meeraugenspitze, a mountain ridge runs with slight bends in a generally northerly direction towards the mouth of the Fischsee valley. The first third of the ridge is rocky and wild and broken in many places, notably breaking down into separate ridges and minor peaks around Froschsee peak; and then from Froschsee peak, directly east of the lake, the main ridge descends about 400 metres and continues as far as the so-called Siedem granatów. This second third of the ridge rises to altitudes of 1,753 to 2,023 metres; in the final third, it ceases to form a rock ridge line, becoming a rounded ridge covered in pasture and forest, veering slightly to the northeast. From a point about 200 metres by the shortest line from Fischsee brook and some 700 to 750 metres from the point where Fischsee brook flows into Poduplaski brook, this rounded ridge levels out between the two brooks. This deepest part of the Zabie ridge descends gradually, in a north-easterly direction, down to the confluence of the two brooks, and then becomes more properly a part of the western slope of the Poduplaski valley than of the Zabie ridge, which thrusts against Fischsee brook at the point where a stream channel flows in from the west, down from Czuba mountain. Up to the aforementioned point about 200 metres from Fischsee brook, the Zabie ridge might clearly serve as a boundary ridge. That point marks the last clearly defined, naturally conspicuous point on the ridge: a slight depression, a protrusion, covered with forest, which stands out on the ridge both from the east and the west. It lies about 150 metres above the path that leads down from the right-hand side of the valley, out of the Fischsee valley to the Poduplaski

valley. In the opinion of the expert, and in the tribunal's own view, all natural obstacles qualify as natural boundaries. At lower levels — that is, in low-lying areas — this includes the watercourses, even more for their beds, or rather their banks, so difficult to climb over, than for the constantly fluctuating flow of water. Higher up in the mountains, the ridges qualify as natural boundaries. Where the watercourse ceases to form an obstacle, whether due to the shape of the stream channel or the volume of water, the boundary naturally follows the mountain ridge, becoming more clearly defined as the land rises. The watercourses become less significant as obstacles, as the mountain ridges become more significant. At any point the boundary may shift from river to ridge line, or from stream-led to rise (see also article II of the Berlin Treaty of 1878, in Rivier, vol. I, p. 169). Here the outlines are somewhat obscured, because two or more brooks come together and by erosion or deposit may reshape and flatten the base of an otherwise distinct ridge.

In the present case, therefore, the most natural boundary would follow the Bialka river upstream as far as its source, that is, to the confluence of Fischsee and Poduplaski brooks, and proceed upstream from this confluence along the Zabie mountain ridge to its highest peak, the Meerauge. The expert feels that acceptance of this natural boundary would also be consistent with the various earlier border descriptions, which make no mention whatsoever of the two lakes situated in the disputed region.

The aforementioned views of the expert and the tribunal are also supported by writers on international law who either utterly reject the suitability of rivers to serve as boundaries (Heffter-Geffcken, p. 151) or at least give preference to mountain ridges (Gareis, *Völkerrecht*, 1887 p. 66; Rivier, vol. I, p. 166).

As it happens, for the segment in dispute a natural boundary between Hungary and Galicia may be found only on the jagged Zabie ridge line, not in the small Fischsee brook, which flows through the forest and in no way divides it, since the forest presents a uniform character on both sides. Lastly, this brook would not be suitable as a boundary because the stream bed is changeable, particularly in its higher, flatter reaches, and the possibility of disputes regarding bridging points could certainly not be ruled out. Additional considerations are that the disputed area is easily reached from Galicia; that it is of considerably greater value to Galicia than it is to Hungary; and that so far the Galician side has clearly shown a stronger interest in the area.

Consequently, despite the strong arguments put forward by the Hungarian representatives, the boundary defined is essentially the dry boundary along the Zabie ridge claimed by the Austrian side. As shall be further summarized below, the arbitral tribunal not only regards this as the natural boundary, but also believes, in view of the determination of the source of the Bialka and the interpretation it felt obliged to give to Nikorowicz's statements at the proceedings, that the documentary evidence predominantly supports this boundary line rather than the one claimed by Hungary.



As a matter of strict logic, this dry boundary line should extend to the confluence of Fischsee and Poduplaski brooks. On the other hand, the arbitral tribunal has taken into account the fact that the present dispute is attributable merely to a misunderstanding regarding the upper reaches and the source of the Bialka river, and that the Hungarian party to the dispute, with reference in particular to its interpretation of the statements of treasury official Nikorowicz and the official military maps, was clearly acting in good faith, especially since lengthy proceedings were required in order to clear up the misunderstanding.

The arbitral tribunal also took into account the expert's opinion that the Zabie ridge ceases to be a ridge line proper in its depression by the protrusion; that it is not well-defined from there to the confluence of the two streams and would need to be physically marked as a boundary line; and, lastly, that this lowest part of the Zabie ridge is really more a part of Hungary's Poduplaski valley than a continuation of the ridge line. Since the protrusion forms a fixed, easily recognizable point merely some 200 metres from that other fixed point mentioned where the mountain stream that flows out of Czuba joins Fischsee brook, a line was drawn between these two fixed points to form the frontier, which would then proceed to follow Fischsee brook until it joins Poduplaski brook. This solution makes it possible to award a part of the forest, which is without doubt the most valuable part of the disputed territory, to Hungary.

As a result, occasion for conflict in the disputed region is reduced to a minimum, and it seems certain that the splendid forest, which has been enclosed by, and cared for by its present owner, the Hungarian Güter Jurgo Javorina, will not be dissected by the border.

In this way, in the interest of fairness and out of a practical concern for the peaceful coexistence of those living on both sides of the frontier, the interests of Hungary with respect to the opportunities afforded by the nature of the terrain were therefore taken into account as far as possible.

It should be noted, lastly, that the line approximately 200 metres long running from the point at which the Zabie ridge ceases to be a ridge line to the point where the mountain stream running down from Czuba mountain flows into Fischsee brook, shall be marked by boundary posts or boundary stones, and that this procedure, which should not encounter any difficulties or doubts related to the terrain, may be entrusted to the two Governments, since it already falls within the sphere of implementation of the present arbitration decision.

Ad II. In the course of the proceedings, Dr. Balzer, as representative of Austria and the province of Galicia, made the reservation, on behalf of his principals, that Galicia should have the right without time limitation to assert and claim, at a later date, a frontier removed further eastwards to the Polish crest. Dr. Balzer justified his reservation on the grounds that a similar reservation had been contained in a Hungarian document concerning a frontier stretching to the Beskid mountains. In fact, however, the reservation

mentioned was not introduced into the proceedings by the Hungarian side. Instead, the Hungarian representative very properly declared that he would submit to the decision reached by the arbitral tribunal. Consequently, the Austrian representative lacked the formal grounds he had adduced for presenting his reservation. Indeed he was not entitled to do so, since his powers only extended to claims relating to the territory presently in dispute. Apart from this, the arbitral tribunal was obliged to reject this reservation, which undermines its position and the validity of its decision, since the purpose of the arbitration agreement was to arrive at not a provisional or temporary but a final determination of the national and provincial boundaries as requested by the two Governments, and to provide a definitive settlement of the boundary dispute in that region, which precludes any further reservations. The reservation submitted by Dr. Balzer is therefore inconsistent with the content and purpose of the arbitration agreement, and is thus inadmissible.

Graz, 13 September 1902

(Signed) *Winkler*

(Signed) *Tschorznicki*

(Signed) *Lehoczky*